SUPREME COURT, U. S.

FILED

Supreme Court of the United States

October Term, 1970

No. 1164

RICHARD A. YAHR, JOSEPH D. MILES, HAL W. NOYES, BRUCE PATTERSON, JOSEPH P. CURTIS, ROBER MALL, DONALD PERKINS, FREDERIK PENN, JACK K. RILEY, DONALD C. MIEHLE, CRAIG G. LEWIS, MICHAEL FLAHERTY, EDWARD V. COX, FELTON C. DONNELL, LEW D. BRICE, WILLIAM K. KIMMEL, DAVID G. SHULMAN, and LAWRENCE J. MILANO,

Petitioners,

—against—

STANLEY R. RESOR, as Secretary of the Army, Department of Defense, and Lt. General JOHN J. TOLSON, Commanding General of Fort Bragg, North Carolina,

Respondents.

PETITIONERS' REPLY BRIEF

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No. 1184

RICHARD A. YAHR, et al.,

Petitioners,

—against—

STANLEY R. RESOR, Secretary of the Army, et al.,

Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY BRIEF

Respondents' glib approach ill befits the important First Amendment questions presented by this case. Like the courts below, respondents are unable to point to a single piece of evidence in the record supporting the Army's conclusion that distribution of *Stagg Briefs* at Fort Bragg PX's and libraries will, or is even likely to, endanger base security and discipline. Nor do respondents cite any evidence demonstrating a rational, let alone compelling, basis for the Army's discriminatory imposition of a system of prior censorship upon petitioners' newspaper while commercial publications and radio and television broadcasters have free access to the base. Cf. *Fortune Society v. McGinnis*, 319 F. Supp. 901, 905-906 (S.D.N.Y. 1970).

Respondents appear to have forgotten that publication and distribution of a newspaper is involved here. We cannot reject the nagging belief that if, instead of *Stars and Stripes*, *Life* Magazine or the Washington Post were barred from Ft. Dix, or Ft. Bragg newsstands because the commander, as in this case, believed they encouraged servicemen to organize against the Vietnam war, preliminary relief would unquestionably have been granted by the courts below or the Solicitor General would have conceded error.

The overriding public interest in the dissemination of ideas by and between servicemen, and not the narrow standards governing private litigation applied by the courts below, measure the propriety and need for preliminary injunctive relief in this case, as in any other involving freedom of speech and press. *Carroll v. Princess Anne*, 393 U.S. 175, 181-182; *Blount v. Rizzi*, ___ U.S. ___ (decided January 14, 1971); *Freedman v. Maryland*, 380 U.S. 51; cf. *Heyb Co. v. Boudre*, 321 U.S. 321, 331. Under these special standards, the Army must sustain a heavy burden of proving that petitioners' speech should be suppressed, preliminarily. And that burden can be satisfied solely upon evidence, not suppositions. On this record, however, only the latter appears.

Respondents argue that the court below correctly upheld the denial of a preliminary injunction because the legal standards and factual basis for ultimate relief had not been completely developed. But on respondents' logic, preliminary injunctions would never be granted, least of all in First Amendment cases. Thus even assuming, *arguendo*, that there remain issues to be tried and argued before final judgment can be entered in this case, preliminary relief is still appropriate and, on this record, required. Cf. *Semmco Motors, Inc. v. Ford Motor Co.*, 429 F. 2d 1197 (2d Cir. 1970); Comment, 71 Col. L. Rev. 165 (1971).

Bragg Briefs has been published monthly for approximately two years. Not a single edition of the newspaper has been approved by the Army for distribution on base. We have

no doubt that the Army will demand a full trial on the contents of each edition, as they have on the present four. If future editions are subject to the same preliminary restraint as the four involved here, then obviously ultimate success on the merits in each case will be a victory in principle, but too late to be meaningful in any practical sense.

CONCLUSION

Because the lower courts denied preliminary relief — so essential to the freedom of press — under standards which do not recognize the preferred position of petitioners' speech and because these courts will continue to treat present and future editions of *Bragg Briefs* in a similar manner, we submit that the issues in this case are both ripe and substantial, and the petition for certiorari should be granted.

Respectfully submitted.

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